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AUTHOR Helm, Virginia M.
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ABSTRACT

The Copyright Act's restrictions on educational use of videotape recorders need clarification either by Congress or by the courts. Administrators and media specialist practitioners should become familiar with licensing agreements and copyright restrictions that accompany audiovisual and technological materials. The use of commercially produced videotapes for instructional purposes is governed by section 110, which allows audiovisual materials during curriculum-related activities on school property. This right is not diminished by "For Home Use Only" warning labels affixed by videotape distributors. Commercial videotapes, as all copyrighted works, are subject to prohibitions against unauthorized coping and/or distribution, with limited exceptions granted to libraries unable to replace damaged or lost works. A problematic question pertains to the right of school libraries to allow users to view videotapes on library premises. Although viewing is in compliance with the section 110 exemption for schools, broader uses are questionable in light of the "Redd Horne" court ruling construction of the term "publicly," which did not distinguish between a commercial venture such as Redd Horne, Inc. and a nonprofit educational enterprise in considering seriatim viewings as "public" showings. Application of the term remains to be clarified by the courts. (CJH)

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Schools, Technology, and the Law: Using VCRs in Educational Institutions

Virginia M. Helm

Introduction

"Only one thing is impossible for God: to find any sense in any copyright law on the planet."[1] We don't know what acquaintance Mark Twain had with the copyright law when he made that observation, but we do know that the law's ambiguities and omissions – whether deliberate or unintentional – have kept and will continue to keep legal scholars wrangling over its meaning and construction. A contemporary cynic not finding much "sense" in copyright law might explain the problem as the natural result of our pressure-sensitive politicians trying to balance and protect conflicting interests. The policy dimensions of copyright law, however, are beyond the scope of this chapter, which focuses on the legal uses of videotape recorders (VCRs) in educational institutions.

Definitions of "publicly" and "perform"

In order to understand precisely the legal and illegal uses of VCRs, we need to understand the statutory definitions of two words: "publicly" and "perform." Section 101 of the Copyright Act[2] states that to "perform" a work "means ... in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." In layperson's terms, one "performs" an audiovisual work merely by running it through the projector or recorder. And what is the significance of this definition of "performing"? Precisely that the right to publicly perform their works is one of the five exclusive rights of copyright proprietors.[3] Since copyright

1. A. Paine, Mark Twain's Notebook 391 (1935), *quoted in* Ramey, *Off-the-Air Educational Videorecording and Fair Use: Achieving a Delicate Balance*, 10 J. C. & Univ. L. 346 (Winter 1983).

2. 17 U.S.C. §§ 101-810 (1976 & Cum. Supp. 1984).

3. Section 106 of the Copyrights Act gives copyright owners the exclusive rights to: (1) reproduce copies of their work; (2) prepare derivative works based on their copyrighted work; (3) distribute copies of their work by sale, rental, lease, or lending; (4) publicly perform their work (if it is a literary, musical, dramatic, choreographic work or a pantomime, motion picture or audiovisual work; and (5) publicly display their work (if it is a literary, musical, dramatic, choreographic, sculptural, graphic or pictorial work – including the individual images of a film – or a pantomime).

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owners have the exclusive right to publicly perform their works, and the showing of a videotape constitutes a performance, the definition of "public" becomes central to the accessibility of videotapes, films, and other audiovisual materials.

Section 101 defines a public place as "a place open to the public" or "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." This definition, obviously, makes it legal for individuals to show films and commercial videotapes in their homes or on their personal property. Without an exemption, however, educational and nonprofit institutions and organizations showing films, filmstrips, or commercial videotapes would have been in violation of the law. Fortunately, Congress did incorporate a special, if limited, exemption for schools.

Section 110 Exemption for Educators

Given the copyright-specific definitions of "publicly" and "perform," and given that the right to publicly perform their copyrighted works is the exclusive right of copyright owners, educators would have had to abandon use of nearly all of their commercially developed electronic audiovisual materials, if not the equipment itself, were it not for section 110. This provision contains an important exemption for educators by permitting:

> (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images is given by means of a copy that was not lawfully made ... and that the person responsible for the performance knew or had reason to believe was not lawfully made.

Several ambiguities in this provision are clarified in the house report[4] which contains definitions and descriptions of several terms. Taken together, section 110(1) and the house report are understood to permit displaying/performing audiovisual works *in nonprofit educational institutions* under the following conditions:

1. They must be shown as part of the instructional program — not for entertainment, recreation, or even (unfortunately) for their intellectual or cultural value if unrelated to a specific teaching activity.
2. They must be shown by students, instructors or guest lecturers — not transmitted by TV (closed or open circuit) from an outside location.
3. They must be shown either in a classroom or other school location devoted to instruction such as a studio, workshop, library, gymnasium, or auditorium if it is used for instruction.

4. H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659-5823.

4. They must be shown either in a face-to-face setting or where students and teacher(s) are in the same building or general area.
5. They must be shown only to students and educators — not to outside groups or even mixed groups of students and community people.
6. They must be shown using a legitimate (i.e., not illegally reproduced) copy with the copyright notice included.

Commercial Videotapes: the "For Home Use Only" Warning

As if the new technology were not sufficiently intimidating in itself, educators and librarians who use commercial videotapes have been confronted with a label which reads: ***"Warning 'For Home Use Only' Means Just That!"*** Or the label may contain this stern admonition: ***"Licensed only for non-commercial private exhibition in homes. Any public performance, other use, or copying is strictly prohibited."*** Or a school may have received a notice from the Motion Picture Association of America, informing media users that: ***"[P]erformances in 'semi-public' places such as clubs, lodges, factories, summer camps, and*** schools ***are 'public performances' subject to copyright control."***

Are these warnings legitimate, misleading or downright false? Are they binding? What are the implications of these warnings for classroom use and for library use? Copyright experts consider these labels misrepresentations of educator-users' rights and therefore not binding, at least not for all school situations. Their view is based on the section 110(1) rights of educators to display or perform works in face-to-face learning situations — a right that cannot be taken away by a label relying on semantic trickery.

The inclusion of schools in the list of semipublic places subject to copyright restrictions applicable to "public performances" *does not preclude use in classroom instruction;* rather it applies to a showing held on school property, perhaps on an evening or week-end, and open to the public for entertainment or for cultural or intellectual benefits. That prohibition is implicit by the qualifications attached to the face-to-face teaching exemption; but a public performance on school property is not the same as instructional activities limited to students. The effect of these warning labels is to confuse the two activities, with the result that educators and school media personnel may be misled into thinking that the restriction applies to the classroom or library when in fact it applies only to school showings open to the public or to showings for entertainment or non-instructional related activities for students.

School Libraries and Videotapes

What impact, if any, do warning labels have upon libraries and their uses of videotapes? Actually, the real and yet unanswered question is

whether libraries can legally allow users to view videotapes on equipment within the library itself. The library, after all, is a public place and while it may loan its videotapes to users to show in their homes, the viewing of library-owned videotapes on library equipment on library property could, under the most conservative construction of the copyright law, be problematic. The cause for concern here arises from a recent decision rendered by the Third Circuit Court of Appeals. In *Redd Horne, Inc.*[5] the appellate court affirmed a lower court ruling that the seriatim viewings of individuals or small groups (no more than four viewers) in an establishment open to the public constituted a copyright infringement. This finding, held the court, "is fully supported by subsection (2) of the statutory definition of public performance" which delimits the transmission or other performance of a work "whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times."[6] The court further substantiated its construction of the law on the basis of Congressional intent as interpreted by the leading copyright authority, Melville Nimmer. The applicability of this case for school or public libraries, however, is neither direct nor clear, because *Redd Horne, Inc.* involves a commercial profit-making establishment that is distinguished from a nonprofit educational institution in section 107, the fair use provision of the copyright law.

School libraries, in any event, can safely allow videotapes to be viewed by teachers or students to the extent that such viewing meets the conditions prescribed above, *viz.*, those pertaining to directly instructional purposes. Presumably this applies to viewings by individual or small groups of students as part of a class assignment or project. Other more generalized, random viewings in the library or media center which are not directly related to instruction may be questionable, unless of course the media specialist or other school personnel obtains permission through license or contract to so use its videotapes.

The *loaning* of videotapes by libraries to users for use in their own homes poses no legal problems; libraries retain the right first granted by the 1909 copyright act to all owners of legal copies, i.e., the right to sell, *loan* or otherwise dispose of their copies.

The *reproduction* of videotapes by libraries, on the other hand, is limited by restrictions in section 108 which also pertain to other audiovisual works. The protections granted to visual and audiovisual works in this provision are somewhat greater than those provided for written works. Specifically, a library may reproduce and/or distribute audiovisual works (motion pictures, videotapes, etc.) for only two reasons: 1) to replace a published work that is lost, stolen, damaged or deteriorating if it cannot be replaced by an unused copy at a fair price and (2) for an unpublished work, for "preservation and security or for deposit for

5. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (1984).
6. *Id.* at 159.

research use in another library. . . ." With the exception of audiovisual news programs, which may be reproduced and distributed in limited quantities, libraries are limited to duplicating a *single copy* of an audiovisual work for another library. In all cases, however, the reproductions of audiovisual works must meet three statutory conditions: 1) there must be no intent to gain financial advantage, 2) the library must be open to the public or, if it is a specialized research library, it must be open to non-affiliated researchers, and (3) notice of copyright must be included in the copies.

Videotaping Educational Broadcasts Off-the-Air

Both commercial and public broadcasting corporations produce educationally valuable television programs and increasing numbers of educators are trying to incorporate into their own classroom curriculum videotaped copies of these programs. Is it legal to videotape copyrighted television programs and show them later in a classroom or school library or auditorium? Does it matter whether the program was broadcast by a commercial or a public station? Can schools build libraries of videotaped television programs?

Guidelines for Off-the-Air Recording of Broadcast Programing for Educational Purposes

The answers to most of these questions are contained in the "Guidelines for Off-the-Air Recording of Broadcast Programing for Educational Purposes" (hereafter, "Guidelines for Off-the-Air Recording"). Ratified in 1981 by the House Subcommittee on the Courts, Civil Liberties, and the Administration of Justice, these guidelines are considered part of the (retroactive) legislative history of the 1976 Copyright Act; though they do not have the force of law, they can be expected to serve as primary criteria for courts assessing "fair use" in any future cases involving off-air videotaping for educational purposes.

Although there are a number of restrictions placed upon the use of videotaped television programs, the two most essential limitations include:

1. Retention of videotaped recordings for no more than *45 calendar days* after the recording date, at which time the tapes must be erased.
2. Showing of videotaped recordings to students only within the *first 10 school days* of the 45-day retention period.

Additional restrictions which must be followed include:

3. Making off-air recordings *only* at the request of an individual teacher for *instructional* purposes – not by school media staff in anticipation of later requests by teachers.
4. Showing the recordings to students no more than two times during

the 10-day period, and the second time only for necessary instructional reinforcement.

5. Allowing the taped recordings to be viewed after the 10-day period only by teachers for evaluation purposes, i.e., to determine whether or not to include the broadcast program in the curriculum in the future.
6. Making duplicate copies of a broadcast program only if several teachers request videotaping of the same program, and using all duplicate copies, of course, in compliance with the restrictions applicable to the original recording.
7. Not physically or electronically altering an off-air recordin , nor combining it with others to form anthologies; showing or using the recording in its entirety, however, is not required.
8. Including the copyright notice on all copies of off-air recordings.
9. Applicability of these guidelines only to *nonprofit educational institutions*, which are further "expected to establish appropriate control procedures to maintain the integrity of these guidelines."

These guidelines apply to all commercial television broadcasts and to some public broadcasting. Several of the major public broadcasting corporations[7], however, also drew up a joint policy statement prior to the enactment of the 1976 Copyright Act. Like the "Guidelines for Off-the-Air Recording," these do not have the legal status of enacted legislation but are considered minimum guidelines for fair use copying of public broadcasting programs.

Public Broadcasting Service Taping Guidelines

Designed specifically and only for schools, the public broadcasting guidelines are similar to the off-air guidelines for commercial broadcasts in that the recordings must be requested by teachers and shown only to students and faculty for instructional purposes on the school property. They differ from the commercial broadcasting off-air guidelines by (1) specifying that the educational institutions be accredited, and (2) not restricting the showings to the students for the class taught by the requesting teacher. Presumably, a teacher could request the taping of a public broadcast program and show the recording to the entire school provided that it served instructional rather than entertainment purposes. Finally, these recordings may be retained for only seven days unless otherwise authorized in writing in advance, though the number of showings is not limited.

Educators who wish to expand their rights to tape and show television programs to their students, however, should be aware of several additional and important considerations. They do, for example, have other options besides following the restrictive guidelines or assuming any

7. Public Broadcasting Service, Public Television Library, Great Plains National Instructional Television Library, and Agency for Instructional Television.

risks of not following them legalistically. First, educators must be aware that both sets of guidelines for off-air taping are *operative in the absence of licensing agreements* which themselves may be either more or less restrictive than the guidelines. This consideration requires someone in the school district, most often the media specialist, to be familiar with any audiovisual licensing agreements applicable to their holdings. Second, when educators wish to expand their use of a particular broadcast program or series, they may write to the copyright holding broadcast corporation for permission — and, if given permission, usually pay a fortune. Third, they can sign a licensing agreement with the Television Licensing Center[8], a commercial enterprise which negotiates agreements with the broadcasting companies and then makes available to schools the videotaped copies of the programs for a fee much lower than any school could individually negotiate with the broadcasting corporations themselves. Finally, there is the matter of fair use mentioned above. Informed educators who understand the fair use concept are in a better position to assess the legality of any actual or proposed uses of audiovisual materials not specifically covered by the copyright law.

Applying Fair Use Criteria to Videotaping Off-the-Air: BOCES and Sony

Before examining recent case law applying fair use to off-the-air recording, we should briefly review the fair use concept and criteria. Fair use is a judicial doctrine dating back to an 1841 decision[9] and first codified in the 1976 copyright revisions. It is intended to help the courts balance the interests of copyright owners and the interests of the public in obtaining at least limited access to copyrighted works. Educators are the prime beneficiaries of this provision, though limited use of copyrighted works is also made available to news reporters and media critics. In spite of four specific factors used for over a century, the doctrine has proven elusive in application and at least one author has written that the "courts have never applied the fair use doctrine with any predictability"[10]. The inherent difficulty of applying the fair use factors has only been exacerbated by the speed of technological development in the last several decades, resulting in the ability to copy, send, perform and otherwise use copyrighted works with little effort, time or money.

What are the four fair use factors? Section 107 of the Copyright Act lists them as follows:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

8. Television Licensing Center, 733 Green Bay Road, Wilmette, Ill. 60091
9. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).
10. Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 Harv. L. Rev. 450 (1982).

(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

One reason for the inconsistency of the application of these factors is that while the courts are to weight all four factors in their deliberations, how much they weight any given factor is left entirely to their discretion.

The two major cases pertaining to videotaping off-the-air have both considered the fair use question. *Encyclopedia Britannica Educational Corporation v. Crooks*[11], commonly known to educators as the *BOCES* case, involved taping off-the-air by an intermediate level state education agency. *Sony Corporation v. Universal City Studios, Inc.*[12], familiarly known as the *Betamax* case, involved, among other things, taping off-the-air by individuals in their homes. Its relevance for educators lies primarily in its analysis of fair use.

While the four fair use factors have not previously been accorded consistent weightings by the courts, it is possible that the Supreme Court's weightings in the *Betamax* case may set more firmly the recent trend to weight the first and fourth fair use factors most heavily. In applying the factors pertaining to the character and purpose of the use and the potential effect on the market value of the copyrighted work, the Court reiterated a legal principle found in a number of preceding lower court decisions, i.e., commercial use is an infringement but "noncommercial uses are a different matter." In holding that the noncommercial, nonprofit character of off-air taping in the home led to a presumption of fair use, the Court necessarily reduced the significance of factors two and three (the nature of the copyrighted work and the extent of the copying). In fact, because the timeshifting involved in home videotaping for later viewing "merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge," the Supreme Court held that "the fact that the entire work is reproduced... does not have its ordinary effect of militating against a finding of fair use."

What applicability does *Sony* have for educators? It may have some bearing on the question concerning the legality of a teacher videotaping a television program at home and later showing it in the classroom. First, it has affirmed the right of individuals, including teachers, to tape a program at home. Second, the four dissenting justices who objected to off-air taping in the home as an "ordinary" use, made it clear that a "productive" use such as the use in scholarship, research *or teaching* [emphasis added], was more likely to be found a fair use in the absence of a negative effect on the potential market for the copyrighted work. This

11. 542 F. Supp. 1156 (W.D.N.Y. 1982), 558 F. Supp. 1247 (W.D.N.Y. 1983).
12. 104 S. Ct. 774 (1984).

perspective, considered with the more lenient majority position and the "Guidelines for Off-the-Air Recording," should give us reason to believe that educators who bring home-taped programs into the classroom are within a "safe harbor" at least as long as they abide by the "Guidelines" in their showing and retention of the videotaped recordings. Whether they may legally retain the taped programs over a period of months or years to show repeatedly is another matter. A strict construction would certainly advise against such activity as a violation of the rights being protected by the "Guidelines for Off-the-Air Recording." A more liberal, "realistic" application would emphasize the minimal harm done to the copyright owner and the minimal likelihood of copyright owners seeking out and pressing charges against the occasional educator taking the trouble to tape a program at home and incorporate it into the classroom curriculum. However, at this point we would be well-advised to remember the other options available to educators as described earlier.

If *Sony* has only limited relevance for educators interested in recording television broadcasts off-the-air, *Crooks* has direct bearing and provides several criteria for assessing the legality of off-air taping. Familiarly known to educators as BOCES—the acronym for the defendant intermediate level state education agency (Board of Cooperative Educational Services)—this case was brought by Encyclopedia Britannica to put an end to the agency's practice of videotaping off-the-air the plaintiff's educational programs which were retained and then duplicated for local school districts at their request.

After years of judicial entanglement, the court ruled in 1982 and 1983 that the agency violated copyright law by its large scale, systematic off-air videotaping of broadcast programs, duplication and retention of those copies, and distribution to all schools in its service region a copy of any master tape upon request. Although the board was a nonprofit agency, serving schools with purely educational videotaped films, the court held that this activity did not constitute a fair use. Central to its reasoning was the extensiveness of the copying (10,000 copies to local schools in 1976) and the obvious commercial harm to the plaintiff which made available copies of the programs through its own leasing arrangements. The schools chose to obtain their videotaped programs from BOCES rather than Encyclopedia Britannica, of course, because of a drastic difference in cost—Encyclopedia Britannica charging what was regarded as prohibitively expensive fees while BOCES required only that the school send a blank videotape on which to copy the requested program. The ready availability of the taped programs from the copyright owner, however, and the harm done to it by way of lost profits, left the defendant educational agency without a convincing fair use argument.

As a result of the BOCES decision, educational institutions or agencies now (should) know that they may engage in short-term, intermittent off-the-air videotaping following the federal guidelines, but they may not engage in long-term, systematic, large-scale taping. From the

"Guidelines for Off-the-Air Recording" it is also obvious that, absent a license or other permission, schools may not build library collections of videotapes of television programs. Carried one step further, this line of reasoning raises serious questions about the legality of teachers maintaining a personal library of videotapes made in their homes but used regularly and repeatedly in their classrooms.

Summary

The restrictions imposed by most laws tend to be regarded as either too vague or too detailed, or both. The copyright law is no exception. Videotape recorders for home use had barely arrived on the market at the time of the 1976 revisions and so the law contains no specific provisions pertaining to the complex questions raised in connection with recording off-the-air[13]. The "Guidelines for Off-the-Air Recording" developed for the educational setting by affected interest groups certainly provide specificity, though educators generally regard them as overly restrictive and counterproductive to the educational enterprise. Section 108 does permit libraries to make and distribute duplicate copies of audiovisual news programs as long as they acquire no "direct or indirect commercial advantage."

The use of commercially produced videotapes for instructional purposes is governed by section 110 of the Copyright Act, which applies to all audiovisual materials and primarily limits their use to specifically curriculum-related activities for students on school property. The right to use commercial videotapes in compliance with section 110 is not diminished or abrogated by any "For Home Use Only" warning labels affixed by producers or distributors to the videotapes. Finally, commercial videotapes, like all other copyrighted works, are subject to the broad prohibitions against unauthorized copying and/or distribution, with certain limited exceptions granted to libraries unable to replace damaged or lost works at a reasonable price.

While there are numerous ambiguities still to be clarified either by Congress or by the courts, perhaps the most problematic question pertains to the right of libraries in general and school libraries in particular to allow users to view videotapes on the library premises. Although viewing videotapes in school libraries in compliance with the section 110 exemption for schools is permitted, broader uses may be questionable in light of the *Redd Horne* construction of the term "publicly." Educators might hope that the courts would distinguish between a *Redd Horne*-type commercial venture and a nonprofit educational enterprise in considering seriatim viewings to individuals or small groups as "public" showings – but at this point, that hope has yet to materialize.

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13. Live secondary *transmissions* of television broadcasts are dealt with in § 110-11(2); transmissions are not recordings and as such are not discussed in this chapter.

One last, and certainly not least, consideration for educators is to bear in mind that for all the emphasis on statutory and case law in this and other discussions of copyright, many technological uses of copyrighted works are governed by licensing agreements. Therefore, it is imperative that educators in general, and perhaps school media specialists or other school officials responsible for purchasing audiovisual materials in particular, know about the existence and substance of any licensing agreements accompanying the technological "software" used in their schools. In order for educators to obtain this knowledge, it is suggested that school boards and administrators initiate the procedures for informing their educational employees about both applicable licensing agreements and copyright restrictions pertaining to the use of all copyrighted works used in their schools.